UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

SURGENER ELECTRIC, INC.
dba McKEE ELECTRIC COMPANY

and Cases 31-CA-27113

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS,
LOCAL 428, AFL-CIO

Rodolfo L. Fong-Sandoval, Esq., of Los Angeles, California, for the General Counsel.

Larry Adams, Organizer, of Bakersfield, California, for the Charging Party.

Howard A. Sagaser, Esq., Fresno, California, for the Respondent.

DECISION

Statement of the Case

JAMES L. ROSE, Administrative Law Judge: This matter was tried before me on July 11, 12, and 13, 2005, on the General Counsel's Complaint which alleges that in violation of Section 8(a)(3) of the National Labor Relations Act, as amended, 29 U.S.C. § 151 *et seq.*, the Respondent refused to consider for employment 15 qualified individuals because of their known affiliation with the Charging Party.

The Respondent generally denied the substantive allegations in the complaint, and affirmatively contends, without offering factual support, certain constitutional violations and the running of the Section 10(b) limitation period. The Respondent also contends it had valid reasons for not considering Larry Adams or anyone whom he recommended, all of which will be discussed below.

Upon the record as a whole, including my observation of the witness, briefs and arguments of counsel, I hereby make the following findings of fact and conclusions of law:

I. Jurisdiction

The Respondent is a California corporation with an office and place of business in Bakersfield, California, from which it has been engaged in the building and construction industry as an electrical contractor. In the course and conduct of this business, it annually derives gross

revenues in excess of $500,000 and receives directly from points outside the State of California, goods products and materials valued in excess of $2,000. The Respondent admits, and I conclude, that it is an employer engaged in interstate commerce within the meaning of Sections 2(2), 2(6) and 2(7) of the Act.

II. The Labor Organization Involved

The Charging Party, Local No. 428, International Brotherhood of Electrical Workers, AFL-CIO (herein the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. The Facts in Brief.

For many years, various locals of the IBEW have sought to organize employees by having current members (sometimes employees of other companies, sometimes employees of the local itself) apply for job openings. This process is often referred to as "salting" and is often resisted by the targeted employer, usually on grounds that the applicants are not bone fide employees seeking work. This is one such case, but, as always, has its own unique facts.

In late 2004,[1] in order to staff a large project in Bakersfield, the Respondent sought the services of a temporary employment agency called Outsource. Outsource in fact referred prospective employees to the Respondent, and specifically on November 15 referred five applicants, including union organizer Larry Adams.

However, the Respondent's CEO (or General Manager), Lester Surgener, was apparently unhappy with Outsource and contacted another temp agency called Staffmark.[2] On September 27, Surgener met with Staffmark Branch Manager, Jane Morgan Corvett. According to Corvett, whose testimony on all material issues I credit[3] Surgener told her "he was displeased with a company called Outsourcing and they were currently sending him resumes and what-not and so he was looking to partner with another staffing service because the people that the other service was sending him were not qualified, were union applicants, and also, he did not care for their contact at that service any longer."

Corvett testified that the general process her company uses when given an order for employees is to search her data base, then submit ads in the local and perhaps distant newspapers (such as Las Vegas in this case) and to post the openings on CalJOBS. When she gets responses, she will fax the applicant's resume to her client to see if the client is interested, and if so she will call the applicant in for a drug and safety test and will then line up an interview

[1] All dates are in 2004, unless otherwise indicated.

[2] Counsel for the Respondent argues that documents indicate that Staffmark was retained before Outsource, a fact assertion I find irrelevant and therefore unnecessary to resolve.

[3] Corvett, and fellow Staffmark employee, Kelly Lee Richardson, have no stake in the outcome of this matter and no longer have any kind of a relationship with any of the parties – employers or employees. Further, they both gave believable accounts of their conversations with the principals of the Respondent. Finally, observing their relative demeanor, I find Corvett and Richardson credible and Surgener unworthy of belief. I credit them generally, and specifically, where there is a direct dispute between what they testified Surgener said in a particular conversation and what he testified he said, I discredit him and credit them.

for the applicant with her client. Thus Surgener told her in the September 27 meeting "when I had a qualified applicant to get it over to Larry (Hansen) and Larry was the person who would interview and make the decision."

Kelly Lee Richardson started with Staffmark on Oct 18. In response to the first CalJOBS ad, Staffmark received eight resumes which she faxed to the Respondent on or about November 19. She followed up with a call to either Larry or Lester (she was unable to recall which, but was "positive it was one of the two") and "I was told at that time that they would not interview any of these people because they were union employees."

After this conversation, Richardson placed a second CalJOBS ad which stated, under job duties, "NonUnion only." On December 22, Adams called Corvett to complain about the non-union requirement in the CalJOBS ad. She in turn called Surgener telling him "that it was my understanding that he had specified to the girls in the office who, in turn, were recruiting based on his non-union requirement and that we could not do that and so we have to recruit for him off of qualifications, and he then said that he refused union applicants, and I said, well, then I cannot do business that way and then he said, well, I'll speak with my attorney and have him call you, which I never received a phone call."

Via Outsource, on November 15 and 16, Adams, Jeff Bode, Joe Furino, Mark Satterfield and Ronny Jungk, were interviewed by Hansen. During these interviews, each of which was surreptitiously recorded by the applicants, Hansen said that the applicant was well qualified and would be hired but for the fact he was a union member and would try to organize other employees. The essence of Hansen's statements to these applicants was not denied by him. I believe that he specifically told the prospective employees that they are qualified (which is undenied by the Respondent) and that they would be hired but for their union affiliation – that for them to be hired and attempt to organize other employees would be a problem that the Respondent "is going to fight you tooth and nail." (Transcript of Adams interview with Hansen.)

On November 15 Richardson faxed to the Respondent the resumes of Kevin Cole, Tony Cook, Mike Stein, and on November 19 faxed the resumes of Brett Garcia, Robert Fajardo, Raymond Mac Neil, Maria Ordaz, Jess Saucedo, Frank Soares and Anthony Urzanqui. These resumes were refaxed by Corvett on December 22, the Respondent having claimed that it had not received them earlier. Indeed, at the hearing Counsel seemed to represent that the Respondent never received these resumes – that "Respondent didn't have them." All these resumes indicated the applicant had union affiliation. None were interviewed by the Respondent.

During the period November/December, employees whose resumes did not indicate union affiliation were hired – two through Outsource and two through Staffmark.

B. Analysis and Concluding Findings.

1. The Violation of Section 8(a)(3).

Unquestionably the Respondent had many openings for qualified electricians during the period November 2004/January 2005 and in fact hired 60. Also unquestionably, the 15 individuals listed in the Complaint were qualified and that the resume of each, submitted to the Respondent by Outsource or Staffmark, stated the individual's union affiliation. None of the 15 was hired, whereas at least four individuals whose resumes did not state union affiliation were hired during this period. I find that Surgener told a Staffmark employee that the Respondent would not interview those whose resumes showed union affiliation and he told the Staffmark

Branch Manager that "he refused union applicants." The Respondent's predisposition to deny employment to union members was confirmed during Hansen's interviews of Adams et al.

On these facts it is abundantly clear that the Respondent refused to consider for employment individuals who had demonstrated union membership and it thereby violated Section 8(a)(3) of the Act. *E.g., FES (A Division of Thermo Power),* 331 NLRB 9 (2000), affd., 301 F.3d 83 (3d Cir. 2002).

2. The Respondent's Defenses.

Counsel for the Respondent offered several defenses, none of which I find meritorious either factually or legally. They will be considered seriatim as they appear in his brief.

Counsel contends that the five individuals interviewed by Hansen tape recorded the interviews without Hansen's consent and thereby violated a Privacy Act section in the California Penal Code, sec. 630-637.6. He then relies on Surgener's testimony that if this criminal activity had been known, they would not have been hired or would have been discharged. This assertion is self-serving and after the fact. Nor would it make these employees unemployable for purposes of the remedy here. The Board has held that taping of job interviews is protected activity and, therefore, could not be a basis for refusing to hire an applicant. *Braun Electric Co.,* 324 NLRB No. 2 (1997).

Further, as quoted by Counsel, this section covers recordings "without the consent of all parties to a confidential communication." There is simply no basis to conclude that an employment interview could be considered a "confidential communication."[4] These were not "personal" conversations Hansen was having with Adams and the others. He was interviewing them on behalf of his employer for purposes of potential employment. Counsel cited no California case holding such interviews to be "confidential communications."

The second defense as to the five who were interviewed begins with an allegation that some 20 months prior to the events here Adams attempted "to get an employee of McKee Electric to steal documents and/or information from McKee's personnel files." For this reason, Surgener testified, he would never hire Adams or anyone whom Adams recommended, meaning, for purposes of this case, the other four.

This situation arose from an apparent attempt by Adams in January 2003 to organize the Respondent's employees during which he asked Rodney York to get him the names and addresses of employees, if he could do so without getting into trouble. York was an electrician who at the time was on disability and was working in the office. Surgener procured from York a statement to the effect that Adams had asked him to steal personal files and then Surgener called in the Sheriff's Department. There was no serious investigation and the matter was dropped.

York was called as witness by the Respondent. While admitting he wrote the statement at Surgener's request (being afraid for his job) he denied that in fact Adams asked him to get anything from employees' personal files. Adams also denied the substance of York's earlier

[4] Transcripts of these recordings were offered into evidence and rejected (except for that of Adams to which there was no objection), not because of the alleged violation of the California Penal Code but because the General Counsel did not give the Respondent a reasonable amount of time to verify their authenticity.

statement. I find that Adams did not solicit an employee to engage in criminal activity, but was engaged activity protected by the Act. It appears that Surgener was using his position in an effort to build a case against a known union organizer as early as 2003. Since, as noted above, I do not generally believe Surgener, I conclude that his assertion is bogus and not a legitimate reason to refuse employment to Adams or those who put Adams as a reference on their resumes.

By way of an additional defense, because these five were referred by Outsource, and because Outsource was too expensive, they would not have been hired. I reject this assertion based on the essentially uncontroverted testimony that Hansen told them they would not be hired because of their union affiliation.

Hansen is the individual who takes applications and interviews prospective employees. He testified that Surgener does all the hiring, however, Hansen clearly has the authority to effectively recommend hiring and does so. On this basis he is clearly a supervisor and, for purposes of hiring employees at least, an agent of the Respondent. As such his statements bind the Respondent and show a predisposition by the Respondent not to hire union members.

As to the remaining 10, the Respondent argues that they never filed applications and therefore could not have not been considered. This argument is based on the assertion that the Respondent's inviolate hiring procedure required all prospective employees to file applications with the Respondent at its office. None of the 10 did so. I reject this argument.

Whatever the Respondent's prior hiring practice, for the purpose of staffing the Bakersfield job the Respondent retained employment services and therefore clearly held its standard practice in abeyance. On retaining Staffmark, the hiring procedure was for Staffmark to find prospective employees and then fax their resumes to the Respondent. If the Respondent stated an interest in such a prospect, then Staffmark would screen and test the prospect, and if this was satisfactory, would then arrange for an interview with the Respondent. The reason none of the 10 filed an application with the Respondent or came in for an interview was because the Respondent stopped the process. Staffmark was told that none of these 10 would be considered because of their union affiliation. The Respondent's technical argument is without merit and its refusal to further consider the 10 was violative of Section 8(a)(3).

IV. Remedy

Having found that the Respondent refused to consider for employment 15 qualified applicants because of their membership in Union, I shall recommend that the Respondent be ordered to cease and desist such activity and to offer employment to Larry Adams, Jeff Bode, Joe Furino, Mark Satterfield, Kevin Cole, and Tony Cook, make them whole for any losses which they may have suffered as a result of the discrimination against them including backpay commencing on November 15, 2004, and Brett Garcia, Robert Fajardo, Raymond MacNeil, Maria Ordaz, Jess Saucedo, Frank Soares and Anthony Urzanqui with backpay commencing on November 19, 2004, until the date they are hired or reject employment pursuant to the formula set forth in *F.W. Woolworth,* 90 NLRB 252 (1950), with interest.

Although some applications contained minor errors and/or were out of date, I do not consider these facts fatal to this remedy. However, material information on the applications of Ronny Jungk and Mike Stein was false. Jungk had never worked for any of the companies listed as previous employers and Stein had never worked for the most recent employer he listed While this false information was not a factor in the Respondent's refusal to consider them, I

conclude such goes beyond the trivial and as a matter of good policy, they should not be given an offer of employment or backpay. It was their choice to falsify their resumes.

Upon the foregoing findings of fact and conclusions of law, I make the following recommended:

ORDER[5]

The Respondent, Surgener Electric, Inc., dba McKee Electric Company, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

a. Refusing to consider for employment qualified applicants because of their membership in, or affiliation with, the Union or any other labor organization.

b. In any other manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

a. Offer employment to Larry Adams, Jeff Bode, Joe Furino, Mark Satterfield, Kevin Cole, Tony Cook, Brett Garcia, Robert Fajardo, Raymond MacNeil, Maria Ordaz, Jess Saucedo, Frank Soares and Anthony Urzanqui and make them whole for any losses they may have suffered as provided in the Remedy section above.

b. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

c. Within 14 days after service by the Region, post at its each of its facilities copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees of the Respondent at any time since March 15, 2000.

d. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated, San Francisco, California, October 19, 2005.

James L. Rose
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered that we post this notice and comply with its terms.

Federal Law gives you the right to:

Form, join or assist a union,
Choose representatives to bargain on your behalf,
To act together with other employees for your benefit and protection,
Choose not to engage in any such protected activity.

WE WILL NOT refuse to consider for employment or hire qualified applicants for employment because of their membership in or affiliation with the Union or any other labor organization.

WE WILL NOT in any other manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer employment to Larry Adams, Jeff Bode, Joe Furino, Mark Satterfield, Kevin Cole, Tony Cook, Brett Garcia, Robert Fajardo, Raymond MacNeil, Maria Ordaz, Jess Saucedo, Frank Soares and Anthony Urzanqui and make them whole for any losses they may have suffered as a result of the discrimination against them, with interest.

SURGENER ELECTRIC, INC.,
dba McGEE ELECTRIC COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Resident Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

11150 W. Olympic Boulevard, Suite 700

Los Angeles, CA 90064

Phone 310-235-7352 (Hours: 8:00 a.m. to 4:30 p.m. (PDT)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (310-235-7123).